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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1908

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Petitioners,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

GEORGE DUGGAN,
Counsel for Petitioners,
10 Commerce Court,
Newark, New Jersey 07102.

PARSONNET, PARSONNET & DUGGAN,
Attorneys for Petitioners.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102 110

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ARGUMENT

Males who retired early are paid smaller pensions than females—in violation of the Act. The Circuit Courts are in conflict on the proper measure of damages.

Respondent has referred to a "substantial actuarial deficit" on pages 12 and 14 of its Brief in Opposition. Actuarial computations cannot be relevant because there was no pension fund herein, prior to July 2, 1965. See *Chastang* v. *Flynn and Emerick Co.* at 365 F. Supp. 970 (D. Ct. Md. 1973) and 381 F. Supp. 1349, 1350 (D. Ct. Md. 1974). In addition, no actuarial computations are in evidence. See the Affidavit of Benjamin Percario (50a):

> "I am aware of no actuarial computations upon which the amounts of pensions paid were based, in any way, upon the predicted amounts of moneys which would have been available to any fund for investment and other purposes due to early retirement by male employees."

In *Rosen,* males who retired early after July 2, 1965, are paid smaller pensions than females because they are penalized for pension credits earned prior to July 2, 1965. In *Chastang* v. *Flynn and Emerick Co.,* 337 F. Supp. 807 (D. Ct. Md. 1972); 365 F. Supp. 957 (D. Ct. Md. 1973); 381 F. Supp. 1348 (D. Ct. Md. 1974); aff'd in part, rev. in part —— F2d —— (4th Cir. June 10, 1976) the Court refused to penalize males who retired early after July 2, 1965, for pension credits earned prior to July 2, 1965.

In *Chastang,* the trial court interpreted *Rosen* to mean (365 F.Supp. 957, 969):

> ". . . plaintiffs are entitled to receive full benefits . . . earned . . . between the effective date of Title VII and the effective dates of their respective retirements . . ."

This rule of damages was applied by the District Court herein, citing *Chastang* as authority (37a).

The Fourth Circuit Court of Appeals majority opinion in *Chastang* stated (127a):

> "We recognize the Rosen v. Public Service Electric & Gas Co., . . . tends to support the position of the Company . . . nonetheless; we agree with the district court."

Senior Circuit Judge Bryan stated in dissent (135a):

> "Retroactivity of the Act to pension plans has been twice denied by the Third Circuit: Rosen v. Public Service & Gas Co., 477 F2d 90 (1973) and eo nomine, 527 F2d 645 (1976) with opinion unpublished."

The Circuit Courts are in conflict on this issue. Pension Plans affect millions of workers in the United States. This question should be resolved by the United States Supreme Court.

Respectfully submitted,

PARSONNET, PARSONNET & DUGGAN
Attorneys for Petitioners
10 Commerce Court
Newark, New Jersey 07102
(201) 622-8347

By: GEORGE DUGGAN
Counsel for Petitioners